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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

DATE: DEC 14 2011 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center (Director). It is now on appeal before the Chief, Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a fiber optics business. It seeks to permanently employ the beneficiary in the United States as a technical support engineer and to classify him as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL).

As defined in the regulation at 8 C.F.R. § 204.5(k)(2):

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree ..."

The Director denied the petition on the ground that the petitioner failed to establish its continuing ability to pay the proffered wage to the beneficiary.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Is the petitioner a U.S. employer?

The regulation at 8 C.F.R. § 204.5(c) provides that "[a]ny United States employer desiring and intending to employ an alien may file a petition for classification of the alien under...section 203(b)(3) of the Act." As defined in the DOL regulation at 20 C.F.R. § 656.3:

> Employer means:
>
> (1) A person, association, firm, or a corporation that currently has a location within the United States to which U.S. workers may be referred for employment and that proposes to employ a full-time employee at a place within the United States, or the authorized representative of such a person, association, firm, or corporation. An employer must possess a valid Federal Employer Identification Number (FEIN). For purposes of this definition, an "authorized representative" means an employee of the employer whose position or legal status authorizes the employee to act for the employer in labor certification matters. A labor certification cannot be granted for an Application for Permanent Employment Certification filed on behalf of an independent contractor.

The petitioner – which identifies itself variously as [redacted] – claims to be doing business in the United States as a branch office of a Korean company – [redacted]. [redacted] is a fictitious business name utilized by [redacted] in the United States, and [redacted] refers specifically to the U.S. branch. The petitioner is not separately incorporated in the United States, but has a FEIN. Due to contrary representations in the record pertaining to its activities in the United States, however, the petitioner has not demonstrated that it is a "United States employer" within the meaning of 8 C.F.R. §204.5(c) and eligible to file a Form I-140 petition. *See Matter of A. Dow Steam Specialities, Ltd.*, 19 I&N Dec. 389 (Comm'r 1986) (in employment-based petitions, a petitioner without a location in the U.S. cannot offer permanent employment to an alien; only a U.S.-based branch office, affiliate, or subsidiary of the foreign organization may file such a petition).

Although the petitioner claims to operate a branch office in [redacted] the petitioner's U.S. tax returns – Forms 1120-F – indicate that the petitioner is not conducting any business in the United States. The petitioner claimed no revenue in 2007, 2008, 2009, and 2010 from its U.S. operation and indicated that it paid no wages to employees. On the first page of each Form 1120-F, the petitioner responded "No" to the query "At any time during the tax year, was the corporation engaged in a trade or business in the United States?" Likewise, on each Form 8833 appended to the Forms 1120-F the petitioner indicated that it "does not have a permanent establishment in the U.S. through with [*sic*] it conducts a U.S. trade or business."

It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's evidence also reflects on the reliability of the petitioner's remaining evidence. *See id.*

Since the petitioner has consistently indicated on its tax returns that it does not conduct business in the United States and does not maintain a permanent establishment in the United States, it cannot be found to be a U.S. "employer" as defined in the regulations. On this ground alone the petition cannot be approved. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d at 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Has the petitioner established its ability to pay the proffered wage?

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful

permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

In this case, the labor certification application (ETA Form 9089) was accepted by the DOL on July 12, 2007. Box G of the form states that the "offered wage" for the technical support engineer is $101,000/year. Box H of the ETA Form 9089 states that the position requires a bachelor's degree in electrical engineering, electronics, materials science, optical engineering, or textile engineering, and five years of experience in the "job offered" or as a sales engineer.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 establishes a priority date for any immigrant petition later based on that document, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, U.S. Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In his Decision dated July 24, 2008, the Director found that the evidence of record established the beneficiary's qualifications for the position – *i.e.* that he had the requisite educational degree and work experience as specified on the labor certification – but that the evidence of record did not establish the petitioner's ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2). The Director indicated that financial statements from the Korean company could not be considered in determining the financial ability of its U.S. branch to pay the proffered wage of an employee in the United States. The Director also found that bank statements of [redacted] business checking accounts in the United States did not demonstrate the petitioner's continuing ability to pay the proffered wage from the priority date up to the present.

On appeal the petitioner has submitted a brief from counsel and additional documentation. In response to a Request for Evidence (RFE) issued by the AAO on August 17 2011, the petitioner supplemented the record with further materials. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case

In determining the petitioner's ability to pay the proffered wage between the priority date (in this case, July 12, 2007) and the present, the AAO first examines whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The record indicates that the beneficiary began working for [redacted] in February 2001, and that he has been employed in the United States uninterruptedly since April 2005, although it is unclear by whom. The record includes the beneficiary's Form W-2, Wage and Tax Statements, for the years 2008-2010, which show that the beneficiary's "wages, tips, other compensation" in those years amounted to the following:

2008:	$24,400.00
2009:	$36,600.00
2010:	$36,600.00

In addition, three earnings statements to the beneficiary in the summer of 2011 show that the beneficiary's monthly gross pay was $3,050.00, and that his total pay for the first eight months of the year amounted to $24,400.00. Assuming the beneficiary was paid at a monthly rate of $3,050.00 from September through December 2011 – which would be another $12,200.00 for the four-month period – the beneficiary's total compensation in 2011 would amount, once again, to $36,600.00. Thus, the compensation recorded on the beneficiary's W-2 forms and pay statements from 2008 to 2011 is far below the annualized proffered wage of $101,000. Furthermore, although the Forms W-2 purported to represent wages paid by the U.S. branch using FEIN 77-0584556, the petitioner's U.S. tax returns, as previously discussed, indicate that it paid no wages during the years in question. This inconsistency further undermines the credibility of the evidence in the record. *See Matter of Ho, supra.*

In a letter dated May 20, 2008, [redacted] stated that in addition to the compensation recorded on his W-2 forms, the beneficiary received the dollar equivalent of $35,423.78 in South Korea, thereby making his total annual compensation $72,023.78 (as of 2008). A statement co-signed by [redacted] and the petitioner's certified public accountant (CPA) in Korea, dated May 14, 2008, appears to confirm this claim of additional income from Korea in 2007. However, no Korean tax return, earnings statements, pay stubs, or other primary evidence has been submitted of the beneficiary's compensation in Korea during 2007. Nor has any corroborating evidence been submitted for any year thereafter. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Moreover, even if persuasive documentation were submitted of the beneficiary's pay in South Korea for every year at issue, it would still leave his total compensation from the petitioner well below the annualized proffered wage of $101,000. Accordingly, the petitioner cannot establish its continuing ability to pay the

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provides no reason to preclude consideration of any of the documents submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

proffered wage from the priority date up to the present based on its actual compensation paid to the beneficiary.

As an alternate means of determining the petitioner's ability to pay the proffered wage, the AAO examines the net income figures reflected on the petitioner's federal income tax returns, without consideration of depreciation or other expenses. *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F.Supp. 2d 873 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *See Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages to all of its employees in excess of the proffered wage to the beneficiary is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now U.S. Citizenship and Immigration Services (USCIS), had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it [sic] represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at

537 (emphasis added). Consistent with its prior adjudications, and backed by federal court rulings, the AAO will not consider depreciation in examining the petitioner's net income.

For a foreign corporation which is doing business in the United States as a branch office and qualifies as a "United States employer" within the meaning of 8 C.F.R. §204.5(c), USCIS considers net income to be the figure shown as "Taxable income before NOL (net operating loss) deduction and special deductions" in Section II of the Form 1120-F, U.S. Income Tax Return of a Foreign Corporation (line 29 in the years 2007-2010). Although the petitioner has not established that it qualifies as a U.S. employer, these tax returns will be considered for the sake of argument. On the petitioner's Forms 1120-F the figure "0" was entered on line 29 for each of the years 2007-2010.[2] Accordingly, the petitioner cannot establish its continuing ability to pay the difference between the proffered wage and the compensation actually paid to the beneficiary from the priority date up to the present based on its net income over the years. These returns further confirm that the petitioner does not do business in the United States, for purposes of meeting the definition of a U.S. employer under the pertinent regulations.

As another alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets as reflected on its federal income tax returns. Net current assets are the difference between the petitioner's current assets and current liabilities.[3] Net current assets can be determined by reviewing Schedule L of the Form 1120-F. A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on Schedule L, lines 18-20 (for the years 2007-2010). If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. In the petitioner's case, however, no figures were entered as current assets or current liabilities for any of the years 2007-2010 (*see footnote 2,* below). Thus, the petitioner cannot establish its continuing ability to pay the difference between the proffered wage and the compensation actually paid to the beneficiary from the priority date up to the present based on its net current assets over the years.

In view of the foregoing analysis, the AAO determines that the petitioner has not established its ability to pay the proffered wage based on the compensation actually paid to the beneficiary, or based on its net income or net current assets as recorded on its federal tax returns, in any year from the priority date (July 12, 2007) up to the present.

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[2] In a letter to the AAO dated September 23, 2011, the President & CEO of [redacted] stated that "we have not capitalized the US branch itself to the extent necessary for [it] to document net income and/or assets in excess of the proffered wage."

[3] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The petitioner asserts that its ability to pay the proffered wage is demonstrated in audited financial statements of [redacted] The documentation of record includes "Financial Statements" for [redacted] for each of the years 2007-2010, which were supplemented in response to the AAO's RFE by cover sheets from the [redacted] South Korea, entitled "Audit report on the Financial Statements of [redacted] and "Independent Auditor's Report for [redacted] These cover documents were not submitted with the financial statements originally submitted to USCIS earlier in the adjudication process. Their tardy submission, in the AAO's view, casts doubt on their veracity.

Once again, it is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. at 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's evidence also reflects on the reliability of the petitioner's remaining evidence. *See id.* In this case, the petitioner has provided no explanation as to why the cover letters from the accountant, including the "Independent Auditor's Reports" bearing the same dates as the associated financial statements, were not submitted conjointly with the financial statements earlier in these proceedings.

In his letter dated September 23, 2011, [redacted] claimed that it would have been "prohibitively expensive" to prepare audited financial statements, as requested by the AAO. While maintaining that the financial statements in the record are correct, he acknowledged that they were "audited internally." These words appears to indicate that the financial statements are not "audited financial statements" within the meaning of 8 C.F.R. § 204.5(g)(2). An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. [redacted] assertion that the financial statements are correct has little probative value. Going on record without supporting documentary evidence does not meet the petitioner's burden of proof. *See Matter of Soffici, supra.*

For the reasons discussed above the AAO concludes that the financial statements in the record have little evidentiary weight.

Furthermore, the AAO advised the petitioner in its RFE that its ability to pay the proffered wage must be established from financial resources of the U.S. branch alone. The AAO suggested that audited financial statements of the U.S. branch operation be submitted for the years 2007-2010. No such documentation has been submitted. [redacted] acknowledged in his letter of September 23, 2011 that the U.S. branch was thinly capitalized – which is amply reflected in the federal tax returns (Forms 1120F) for the years 2007-2010. Thus, it appears that there was little in the way of financial assets in the United States to audit during these years.

The petitioner asserts that [redacted] regularly transferred funds to its U.S. branch office. Counsel points to documentary evidence of wire transfers made from South Korea to [redacted] during 2007 and 2008 to fund the operation of the U.S. branch office. The record includes bank records of [redacted] showing that the wire transfers were received in two different business checking accounts at Bank of America, though the specific purpose of those funds – such as paying the beneficiary's salary, office rental, equipment and supplies, business travel, etc. – is not stated.

While the regulation at 8 C.F.R. § 204.5(g)(2) provides that bank accounts may be considered "in appropriate cases" by USCIS in determining a petitioner's ability to pay the proffered wage, the documentation of [redacted] bank accounts is incomplete. The record includes monthly closing balances for one account – [redacted] – over an 18-month period from January 2007 through June 2008. No monthly bank statements have been submitted for the other account – no. [redacted] The monthly statements for account [redacted] recorded the following closing balances:

January 2007	$ 7,838.77
February 2007	$17,853.08
March 2007	$10,425.09
April 2007	$ 4,071.07
May 2007	$32,552.99
June 2007	$33,540.63
July 2007	$32,497.45
August 2007	$ 2,406.64
September 2007	$11,913.18
October 2007	$19,853.26
November 2007	$ 4,969.26
December 2007	$11,887.54
January 2008	$ 9,875.12
February 2008	$13,887.70
March 2008	$21,524.12
April 2008	$17,402.04
May 2008	$ 9,002.97
June 2008	$14,614.05

As previously discussed, the record shows that there was a $76,600 shortfall in 2007 and a $64,400 shortfall in the years 2008-2011 between the annualized proffered wage of $101,000 and the beneficiary's salary in those years (not including any additional amounts he may have received in Korea, for which there is insufficient (2007) or no documentation (2008-2011) in the record). To make up that difference the petitioner would have needed to pay the beneficiary an additional $6,383.33 per month in 2007 and $5,366.67 per month in 2008 and succeeding years. In two different months after the priority date (July 12, 2007) – specifically, August 2007 and November 2007 – the closing balance of the bank account was less than the difference needed to pay the monthly shortfall in the beneficiary's proffered wage. In several other months the closing balance in the account was only a few thousand dollars higher than the monthly shortfall in the beneficiary's proffered wage. Had the petitioner paid the beneficiary the shortfall in his monthly proffered wage every month from July 2007 onward out of account no. [redacted] each month's closing balance would have been progressively lower, necessitating additional financial infusions from [redacted] in South Korea. It has also not been explained why none of these bank assets was recorded on the petitioner's U.S. tax returns as "cash" in Schedule L. In short, the documentation in the record does not establish the petitioner's continuing ability to pay the proffered wage from the priority date up to the present from its U.S. bank accounts.

Counsel cites several administrative and judicial decisions in support of its contention that the financial resources of [redacted] in Korea should be considered in determining the petitioner's ability to pay the proffered wage. In *Matter of Pozzoli*, 14 I&N Dec. 569 (Reg. Comm. 1974), the legacy Immigration and Naturalization Service (INS) ruled that it did not matter whether an L-1 visa holder (intracompany transferee) is paid by the U.S. employer or its related foreign company. The ability to pay is not an element that must be proven by employers of L-1 visa holders, however, so that case is irrelevant in this second preference immigration proceeding. Counsel also cites a U.S. district court decision in *Full Gospel Portland Church v. Thornburgh*, 730 F.Supp. 441, 449 (D.D.C. 1988), in which a federal district court ruled that it would be "arbitrary for the INS not to consider the resources of the larger organization in making its evaluation of ability to pay." The "larger organization" in that case, however, was a U.S. organization whose resources were located overwhelmingly, if not exclusively, within the United States. That situation contrasts sharply with the instant case in which the "larger organization" is a Korean company whose resources are overwhelmingly outside the United States in South Korea, and which, by law, may not be a U.S. employer. *See* 20 C.F.R. § 656.3. Thus, the facts in the district court decision are materially distinguishable from those in the instant proceeding. Moreover, the AAO is not bound to follow the published decision of a United States district court, even in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Finally, counsel cites a federal appeals court decision, *Rahman v. Chertoff*, 530 F.3d 622 (7th Cir.) 2008), ruling that the AAO could not discount an expert's reliance on an unaudited financial statement without providing a reason, as obliging the AAO to accept the petitioner's internal audits and the letter from its president and CEO certifying their accuracy as credible evidence of the petitioner's ability to pay the proffered wage to the beneficiary. The regulation at 8 C.F.R. § 204.5(g)(2) clearly specifies, however, that audited financial statements are required. Moreover, there is no indication that any of the petitioner's financial resources, as presented on the financial statements, are located within the United States. Thus, even if the figures were properly audited, they would not represent acceptable evidence of a petitioning U.S. employer's ability to pay the proffered wage of an employee in the United States.

In addition to the foregoing criteria, USCIS may also consider the totality of circumstances, including the overall magnitude of business activities, in determining the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612.[4] As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the instant petitioner's financial ability that falls outside

[4] The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

of its net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In this case, the record indicates that [redacted] was founded in South Korea in 1995 and opened its U.S. branch office in [redacted]. As of August 2007, according to [redacted] president, [redacted], in a letter accompanying the immigrant visa petition, [redacted] had 30 employees at its headquarters and three employees at the U.S. branch office. They included the president, who doubled as West Coast sales manager, an East Coast sales manager, and a technical support engineer (the beneficiary). According to [redacted] sales totaled $2.2 million in 2006, had been flat over several years, but were expected to rise in 2007 with sales to the United States of approximately $1 million. The U.S. figure was entirely speculative, and no further information has been submitted about the company's business since 2007, either in the United States or overseas. In fact, the tax returns in the record indicate that the petitioner does not do business in the United States and generates no revenue from this operation. Thus, there is little or no evidence of the company's business success over time, and no indicators whatsoever since 2007. The petitioner has not demonstrated a steady path of growth. Based on the foregoing analysis, the AAO concludes that the petitioner has failed to establish that the totality of its circumstances, as in *Sonegawa*, demonstrates its ability to pay the difference between the proffered wage and the amount of compensation actually paid the beneficiary at any time from the priority date up to the present.

For all of the reasons discussed herein, the AAO determines that the petitioner has failed to establish its continuing ability to pay the proffered wage to the beneficiary from the priority date (July 12, 2007) up to the present. On this ground as well, the petition cannot be approved.

Conclusion

Thus, the petitioner has failed to establish that it qualifies as a U.S. employer. It has also failed to establish its continuing ability to pay the proffered wage to the beneficiary from the priority date up to the present. The petition will be denied for both of these reasons, with each considered as an independent and alternative basis for denial.

The burden of proof in these proceedings rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.